NO. 21178

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLIE BOB WESLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant Charlie Bob Wesley to be guilty of the one-count indictment following trial by the Court (C.T. 4).

The offense occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 495 and 3231. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Section 1291 and 1294.

1/ "C.T." refers to Clerk's Transcript.

II

STATEMENT OF THE CASE

Appellant Charlie Bob Wesley was charged in the one-count indictment returned by the Federal Grand Jury for the Southern District of California, Southern Division, at San Diego, California on January 5, 1966. (C. T. 2) .

The only count in the indictment alleged that appellant Charlie Bob Wesley wilfully and knowingly forged, counterfeited and falsely made the endorsement and signature of the payee, Robert W. White to United States Treasurer's Check No. 22,554,901, dated July 31, 1965, in the amount of $58.00 for the purpose of obtaining and receiving from the United States and its officers and agents the sum of $58.00.

A Jury waiver was executed on April 5, 1966 and trial by the Court commenced and ended on the same date before United States District Judge James M. Carter. (R.T.2).[2/] Appellant was found guilty as charged on April 5, 1966 (R.T. 93) and was sentenced on June 6, 1966 to the custody of the Attorney General for eight years (C.T. 4).

Appellant filed a notice of appeal on June 13, 1966. (C.T. 5).

III

ERROR SPECIFIED

The Error Specified by appellant is paraphrased as follows:

1. That the conviction is unsupported by evidence and is therefore invalid.

2/ "R.T." refers to Reporter's Transcript

2. That the Trial Judge was biased and prejudiced.

3. That the handwriting samples should not have been admitted because of appellant's health at the time they were taken.

IV

STATEMENT OF THE FACTS

Robert W. White receives a monthly military disability check as a result of being in the army. He never received his check that was due on July 31, 1965, in the amount of $58.00. (R.T. 4, 5).

Mr. White has known appellant (R.T. 6) about fifteen years, but never authorized appellant to endorse White's name on the check, cash it, or do anything with the check (R.T. 7).

Appellant resides at 2803 Imperial Avenue, San Diego, California (R.T. 4).

The check always comes in his mailbox and Mr. White or his mother always pick it up. Mr. White never entrusted a friend to pick up his check. (R.T. 10).

The check in question was cashed at the Cash King Market by an unknown person (R.T. 14-15). The check was returned to them. (R.T. 16).

Mr. White viewed the endorsement "Robert W. White, 2803 Imperial Avenue" and this was not his writing. He didn't authorize anyone else to sign the check (R.T. 6).

Ralph Schoonover, handwriting expert, testified concerning authorship of the forged endorsement. Counsel for appellant stipulated to his qualifications on the subject. (R.T. 17).

Mr. Schoonover used Secret Service Forms 1607, Exhibits 2A and 2B, obtained by Harley Limke, Special Agent, Secret Service and Floyd Cozad, Postal Inspector. (R.T. 19).

He also used Exhibits 3A, 3B, and 3C which were San Diego Police Department exemplar forms. Mr. Schoonover has examined appellant's handwriting in over 50 separate instances and is familiar with appellant's handwriting. He looked at other handwriting of appellant in this case (R.T. 20).

There were definite distinctive characteristics of this writer that have shown up in the past. (R.T. 22).

The letter "I" has "a very distinctive and individual characteristic" (R.T. 22). Mr. Schoonover went through fifty or sixty pages of appellant's writing (R.T. 85).

Mr. Schoonover testified that in his opinion appellant attempted to disguise his handwriting on exhibit one, the check in question. He also testified to an attempt to disguise the writing on second sheet of the exemplars of the Secret Service where the writing was of the name Robert W. White, the name in question. (R.T. 21, 29).

Appellant testified on direct examination that he had not endorsed any government checks since being released from prison (R.T. 55, 57). He specifically denied having endorsed exhibits 5 and 6, said exhibits consisting of U. S. Treasury Checks. (R. T. 58, 60)

Mr. Schoonover testified that in his opinion appellant endorsed these 2 checks also (R.T. 64) as well as six other U. S. Treasury checks (R.T. 65).

Mr. Schoonover also eliminated appellant as the author of the Alonzo Cousins check. (R.T. 66, 74). Exhibit 2A was not disguised, while exhibit 2B was disguised. (R.T. 66).

The disguised exemplars and the disguised questioned writing compare favorably (R. T. 30). In finding that appellant endorsed exhibit one, Mr. Schoonover used the following expressions:

Not the slightest doubt in his mind (R.T. 25)

He was 100 per cent sure (R.T. 40)

No chance for error in this case (R.T. 32)

One in a trillion (R.T. 36)

Appellant claimed to live 15 or 20 blocks from the addressee. Harley Limke testified he lived a total of 8-1/2 blocks from the addressee and four of these were short blocks. (R.T. 89).

Appellant had been convicted of a felony (R.T. 60).

V

ARGUMENT

A. THE CONVICTION OF APPELLANT WAS SUPPORTED BY SUFFICIENT EVIDENCE.

Appellant contends that his conviction was based on inherently incredible evidence. Having made this unwarranted assumption, he then proceeds to invoke the doctrine of Thompson v. City of Louisville, 362 U. S. 199 (1960), contending that such evidence amounts to no evidence at all, and hence will not support a conviction.

To so contend is to misread the import of the Thompson case. Later cases have held Thompson applicable only where there is no evidence of guilt. It has not been expanded by analogy. Clearly, this is not such a case.

See: Cox v. Louisiana, 379 U. S. 559 (1964).

DeHam v. Decker, 361 F.2d 477 (5th Cir. 1966).

Appellant complains that there was no eye-witness testimony used to convict. It is submitted that eye-witness testimony in a prosecution for forgery is almost never forthcoming. The very nature of the offense requires that it usually be proved by circumstantial evidence.

Appellant asserts that the only evidence linking him with the crime was the uncorroborated testimony of the handwriting expert, Mr. Schoonover, from the San Diego Police Department. There was no attempt by appellant to discredit Mr. Schoonover or to impeach his credentials. In fact, appellant stipulated to his qualifications (R.T.17). Mr. Schoonover is a recognized expert in his field, and testified in a very forthright manner. Mr. Schoonover testified that he had probably examined appellant's handwriting over fifty separate times over a period of years (R.T. 20). He explained in detail the bases for his opinions, and the scientific nature of his specialty. He described in detail the distinguishing characteristics that were present in the exemplars of appellant's handwriting and the check in question (R.T. 20-25). Contrary to appellant's contention that his opinion was based on insufficient samples, Mr. Schoonover asserted that he had more than enough to narrow the possibility of error to an infinitesimal degree (R.T. 32-34). Mr. Schoonover then positively

identified appellant as the author of the forged endorsement, based on his study of other writings of appellant (R.T. 39,40). When prompted by defense counsel on cross-examination he stated that he was a hundred per cent sure (R.T.40). His testimony was totally uncontradicted, except by appellant's denial. Appellant could have produced his own experts for this purpose. Failure to present any contradictory evidence would seem to indicate that there was none.

The weight to be given the testimony of an expert witness is purely a question of discretion for the trier of fact to determine.

Wong Ho v. Dulles, 261 F.2d 456 (9th Cir. 1959).

No criminal case has been found which touches on the question of whether expert testimony alone is sufficient to convict. There are, however, several civil cases which hold that the trial court has the privilege of relying on the testimony of a single expert witness, even if there is other testimony to the contrary, and the Court of Appeals is not privileged to overrule the trial Court.

See: Caddy - Imler Creations, Inc. v. Caddy, 299 F.2d 79 (9th Cir. 1962)

Evans v. United States, 319 F.2d 751 (1st Cir. 1963).

It is submitted that there should be no different rule for criminal cases. The basic question is one of credibility, and there is nothing in the record to indicate that the trial court should have disbelieved Mr. Schoonover.

It is well settled that on appeal, the facts are to be interpreted most favorable to the government.

Glasser v. United States, 315 U. S. 60 (1942).

Stein v. United States, 337 F.2d 14 (9th Cir. 1964).

B. THE TRIAL JUDGE WAS NOT BIASED AND PREJUDICED.

Appellant alleges that the remarks of the trial court subsequent to the verdict of guilty were indicative of "unremitting hostility" on the part of the judge, such as to deny appellant his right to a fair and impartial tribunal. This melodramatic claim cannot be reconciled with the facts in this case. Aside from the allegedly detrimental remarks (R.T.94-95) after the trial was over, a search of the record reveals no comment of the court deviating from a standard of strict impartiality.

As for the alleged prejudicial remarks, it is hard to see in them the ominous undertones read in by appellant. The trial court merely advised appellant to clear up any other potential charges against him, if indeed, any existed. The possible existence of other forgeries, appellant was not on trial for, was raised by the introduction of Exhibits 5 and 6 and by the testimony of appellant and Mr. Schoonover (R.T.57-65). Judge Carter implied he would consider any cooperation by appellant at time of sentence. These comments of the trial court, then, were to appellant's advantage rather than his detriment.

In Ferrari v. United States, 169 F.2d 353, (9th Cir. 1948), in a non-jury trial, as in this case, the "following language was used "as a prerequisite to the disqualification of a judge personal bias must be shown, which has been held to be an attitude of extrajudicial origin." citing Craven v. United States, 1 Cir., 22 F.2d 605.

In appellant's case, the remarks complained of were obviously not

personal in nature and not of extrajudicial origin but originated from admissible evidence during the trial.

Finally, at no time during the trial was the question of prejudice and hostility on the part of the trial court raised. This is difficult to reconcile with the unwarranted charge of "unremitting hostility" toward appellant. Such a claim should be given little or no weight when raised for the first time on appeal, particularly when evidence of bias and prejudice is non-existent.

C. THE HANDWRITING EXEMPLARS WERE PROPERLY ADMITTED.

Appellant contends he was ill when the handwriting exemplars were given to Special Agent Limke and Inspector Cozad.

The only evidence of the alleged illness is appellant's own testimony (R. T. 52). Appellant admits being advised of his Constitutional rights (R.T. 51, 52, 53).

Appellant was impeached by Inspector Cozad's testimony to the effect that appellant appeared normal (R.T. 74-75).

Cozad said he was calm and not nervous in any fashion while filling out Exhibit 2A, the Cousins exemplar, but seemed somewhat concerned while writing Exhibit 2B, the White exemplar.

Appellant was also impeached by his prior felony conviction and by other material mis-statements.

Juries are regularly instructed:

"If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony

of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distruct such witness' testimony in other particulars; and you may reject all the testimony of that witness, or give it such credibility as you may think it deserves."

and are further instructed:

"A defendant who wishes to testify, however, is a competent witness; and the defendant's testimony is to be judged in the same way as that of any other witness."

See: Federal Jury Practice and Instructions, by Mathes and Devitt; Instructions 9.06 and 9.12.

Interpreting the evidence most favorable to the Government, the Court may well have disregarded appellant's contentions that he was ill.

Appellant was in the office only 2 hours, during which time he was interviewed, handwriting exemplars were obtained, appellant ate lunch and the officers discussed the matter with the United States Attorneys' office (R.T.75).

Assuming, arguendo, that Exhibits 2A and 2B were inadmissible, any error would be harmless. (F.R.C.P., Rule 52(a)).[3/]

No claim of error is made, nor appears appropriate from the record

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3/ "F.R.C.P." refers to Federal Rules of Criminal Procedure.

regarding the other exemplars and the many other writings used by Mr. Schoonover in formulating his expert opinion.

It is obvious from the record, the expert opinion would have been the same, as well as the Court's finding of guilty.

No objection was made to introduction of Mr. Schoonover's testimony nor Exhibits 2A and 2B and no plain error resulted. (F.R.C.P. Rule 52 (b)).

VI

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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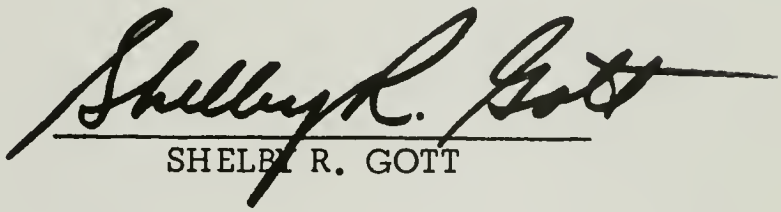
CERTIFICATE

I certify in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



SHELBY R. GOTT